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AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

JULY 17 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

)	2 CA-JV 2008-0027
)	DEPARTMENT B
)	
IN RE OMAR N.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18185501

Honorable Kathleen Quigley, Judge Pro Tempore

AFFIRMED IN PART; VACATED AND REMANDED IN PART

Barbara LaWall, Pima County Attorney
By Kate Rudersdorf

Tucson
Attorneys for State

Robert J. Hirsh, Pima County Public Defender
By Julie Levitt-Guren

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Attorneys for Minor

V Á S Q U E Z, Judge.

¶1 Appellant Omar N. was charged by delinquency petition with having committed first-degree burglary and theft by control. Pursuant to a plea agreement, he was

adjudicated delinquent after he admitted having committed attempted second-degree burglary and theft by control. Following a restitution hearing, the juvenile court ordered Omar to pay \$1,718.87 in restitution, the full amount the victims had requested. The court ordered that Omar was jointly and severally liable for the amount, together with the other minors who had been involved in the incidents that gave rise to the offenses. On appeal, Omar challenges the restitution order, contending the court erred by finding him jointly and severally liable for the full amount of restitution, rather than ordering him to pay, at most, one-third of the total amount claimed.

¶2 At what was referred to as a change-of-plea hearing, Omar admitted having “attempted to commit burglary in the second degree of a residential structure, belonging to or occupied by [the victims,] in violation of A.R.S. §§ 13-507, 13-603, 13-701, 13-702, 13-801, 13-804, 13-811 and 13-1001.” He also admitted having committed theft by control as alleged in the petition by “knowingly controlling property, to wit: a firearm, described as follows: handgun, belonging to John Doe, in violation of A.R.S. §§ 13-1802(A)(1)(E), 13-303, 13-603, 13-701, 13-702, 13-801, 13-804 and 13-811.” Although the state asserts in its answering brief that Omar agreed to pay restitution, the plea agreement simply included a restitution cap of \$2,000; it did not provide that Omar agreed to pay restitution. Before accepting Omar’s admissions, the juvenile court advised Omar he could be ordered “to pay up to \$2,000 in restitution for any damages or property that wasn’t returned.” Omar

admitted he had entered the victims' home without their permission. Assisting in establishing a factual basis for the admission, defense counsel stated:

Your Honor, if I may add, initially the [home]owners' daughter [Angelica] who did not reside with them, she and two of her friends broke into the house.

They left—after they took things from the house, they went to a nearby park where they ran into Omar and two other boys and told them that the house was open and that there were plenty of other things, that they should go and take some things; and that's why the house was open for Omar to enter, but the family was not at home and obviously was not there to give permission, if they would have even been inclined to do so.

Omar then admitted he had taken a gun.

¶3 At the subsequent restitution hearing, one of the victims testified her house had been broken into, and she confirmed the accuracy of a list she had prepared of the items that had been stolen. They included: a digital camera, two gold bracelets, Nike shoes, cash, and various other personal items. She also testified a bathroom window had been broken and that she had lost a day of work because she knew the “kids” in the school were aware of the break-in and she had to watch the house until the window could be repaired. Primarily through the testimony of the probation officer, the record established that an initial group of juveniles, including Angelica, the step-daughter of the testifying victim, had broken into the home with two other girls because she had been angry at her father. The probation officer testified Angelica had told him she and the two other girls had broken the window with a shovel and had entered the house and taken some items. The probation officer added

that Angelica had been ordered by a different judge the previous day to pay one-third “of the restitution amount [of \$1,718.87] with no joint or several liability involved, simply one third.”

¶4 Through objections and various discussions with the juvenile court, defense counsel made it clear she objected to requiring Omar to pay the entire amount of restitution because there had been two incidents and Omar had not been part of the group that had broken in initially and had stolen the first items. The state argued in closing: “[I]t is not the victim[s’] burden to differentiate which Minor took which item from their home.” The state acknowledged the window had not been used by any of the juveniles to enter the house and at least some evidence showed the window had been damaged during the first break-in, but argued “the window was something that was broken in the attempt to take items from the home.” Again defense counsel argued Omar should not be responsible for the items he had not taken nor for the repair of the window he did not break, pointing out the only item subject to the theft charge was the gun that had been returned to the victims. He asserted he was not admitting he had acted as an accomplice in the initial break-in. In its under advisement ruling, over Omar’s objection, the court ordered Omar to pay \$1,718.87, “joint[ly] and severally with the other minors before the court in this case.”

¶5 On appeal, Omar challenges the restitution order for essentially the same reasons he asserted below. He contends the juvenile court erred in making him jointly and severally liable for the full amount of restitution because he only admitted theft of the gun

and attempted burglary; the gun had been returned, and the burglary charge, unlike the theft charge, did not include an accomplice theory of criminal culpability. *See* § 13-303 (providing criminal liability for the conduct of another). Therefore, he argues, he could not be found responsible for the entire amount of the victims' losses, together with other minors.

¶6 Section 8-344, A.R.S., provides that, when “a juvenile is adjudicated delinquent, the court . . . shall order the juvenile to make full or partial restitution to the victim of the offense for which the juvenile was adjudicated delinquent” *See also* Ariz. Const., art. II, § 2.1(A)(8). The propriety and amount of restitution must be established by a preponderance of the evidence. *See In re Stephanie B.*, 204 Ariz. 466, ¶ 15, 65 P.3d 114, 118 (App. 2003). The juvenile court “has discretion to set the restitution amount according to the facts of the case in order to make the victim whole.” *In re Ryan A.*, 202 Ariz. 19, ¶ 20, 39 P.3d 543, 548 (App. 2002). We will not disturb a juvenile court’s restitution order in a delinquency proceeding absent an abuse of discretion, which includes an error of law. *In re Erika V.*, 194 Ariz. 399, ¶ 2, 983 P.2d 768, 769 (App. 1999). And, we “will uphold [a] restitution award if it bears a reasonable relationship to the victim’s [compensible] loss.” *In re Ryan A.*, 202 Ariz. 19, ¶ 20, 39 P.3d at 548.

¶7 In light of the similarities between the adult and juvenile restitution statutes, we look to the law applied in the adult context for guidance. *See Erika V.*, 194 Ariz. 399, ¶ 4, 983 P.2d at 769. Relying on *State v. Wilkinson*, 202 Ariz. 27, ¶ 7, 39 P.3d 1131, 1133

(2002), Division One of this court noted that only economic loss the victim would not have sustained “but for the juvenile’s criminal offense” is compensable and the juvenile’s “criminal conduct must [have] directly cause[d] the economic loss.” *In re William L.*, 211 Ariz. 236, ¶ 13, 119 P.3d 1039, 1042 (App. 2005). “[I]f the loss does not flow directly from the defendant’s criminal activity,” it is not recoverable. *Id.*; *see also In re Stephanie B.*, 204 Ariz. 466, ¶ 10, 65 P.3d at 117 (to recover restitution from juvenile adjudicated delinquent, victim must show he or she suffered economic loss “the victim would not have incurred but for the [juvenile’s delinquent act]” and that “directly result[ed] from the [juvenile’s delinquent act].”); *In re Maricopa County Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996) (restitution proper if supporting evidence “reasonably leads to the inference that juvenile’s criminal conduct was related to victim’s damages”).

¶8 Further, a “defendant can be ordered to pay restitution only on charges he has admitted, on which he has been found guilty, or upon which he has agreed to pay restitution.” *State v. Pleasant*, 145 Ariz. 307, 308, 701 P.2d 15, 16 (App. 1985). A person cannot be required to pay restitution for an uncharged offense unless the person admits having committed the offense and there is evidence to support it or the person has agreed to pay restitution for that uncharged offense. *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997). Thus, in *Lindsley*, the court found the victim of a forgery was not entitled to restitution for jewelry allegedly stolen from her wallet, even though the forger had obtained the victim’s check from the wallet; *Lindsley* had not been charged with or

convicted of theft and had not admitted committing theft. Nor had she agreed to pay restitution for the alleged loss. *Id.*

¶9 We also find instructive the court’s decision in *Stephanie B.* Stephanie had been charged with “aggravated assault ‘due to the fracture of a body part,’” to wit, the victim’s teeth, and “aggravated assault ‘while the victim’s capacity to resist is substantially impaired.’” *Stephanie B.*, 204 Ariz. 466, ¶ 5, 65 P.3d at 116, *quoting* former A.R.S. § 13-1204(A)(8), (11). She was adjudicated delinquent for aggravated assault based on the victim’s capacity to resist but not for the fracture of any body part. *Id.* ¶ 6. She argued on appeal that she could not therefore be ordered to pay restitution based on having broken the victim’s teeth because she had not been found delinquent on that charge. *Id.* ¶ 8. Noting that restitution does not require proof beyond a reasonable doubt, Division One of this court found the juvenile court “permissibly and appropriately determine[d] that Stephanie was responsible for restitution for the fractured teeth on one adjudicated offense even though the State failed to prove beyond a reasonable doubt the other offense asserting the fracture.” *Id.* ¶ 16. The court explained: “[A] restitution award is not barred because the juvenile has been found not delinquent on a charged offense *so long as* the juvenile is found delinquent of another criminal offense that properly supports the award.” *Id.* ¶ 17.

¶10 In this case, Omar did not admit committing burglary; he admitted he had committed theft of the gun and attempted burglary. Nor did he agree to pay restitution for any offense, acknowledging only that the court may order him to pay restitution. And even

assuming, in light of Omar's admission that he had actually entered the house in order to commit a felony therein, rather than simply attempting to do so, the award is not supported by the record. There was no evidence Omar had anything to do with damaging the window—only that Angelica and her companions had broken it in the course of their commission of burglary. Thus, even though Omar admitted he had entered the home without permission, the window was not damaged in the course of his attempt to commit or his commission of either burglary or theft. The window was damaged well before Omar committed an offense. Thus, Omar is not liable for the damage to the window. Because the victim's lost wages were a consequence of that damage, he cannot be held liable for that economic harm either.

¶11 Nor does the record sufficiently support the juvenile court's order finding Omar jointly and severally liable for all property taken from the home. The only item Omar was charged with, and admitted taking, was the gun, which was returned to the victims. Even assuming, as a general principle, that a person who admits having committed burglary but does not admit theft in connection with the burglary may be ordered to pay restitution for items stolen in the course of the burglary, the record simply does not establish a sufficient nexus between the offense Omar committed and the victims' property losses. Again, it is undisputed Angelica and her companions had taken certain property well before they went to the park and Omar became involved in the events. Had there been only one incident, we would agree with the state that neither it nor the victims were required to

establish precisely which items Omar had taken. But under the circumstances of this case, finding Omar responsible for all missing items was an abuse of discretion. There were two incidents of burglary, and Omar clearly had nothing to do with the first. Had the state been able to establish which items the first group of perpetrators had taken, perhaps Omar and his companions could have been held jointly and severally liable for the remaining items that were missing. But not all losses claimed here could have “flow[ed] directly from [Omar’s] criminal activity.” *William L.*, 211 Ariz. 236, ¶ 13, 119 P.3d at 1142; *see also Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250; *State v. Ferguson*, 165 Ariz. 275, 277, 798 P.2d 413, 415 (App. 1990) (defendant who plead no contest to theft and trafficking in stolen property as to one victim, could not, absent agreement, be required to pay restitution to second victim).

¶12 Although we affirm the juvenile court’s order adjudicating Omar delinquent, the order of restitution is vacated, and this matter is remanded to the juvenile court for a redetermination of restitution consistent with this decision.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge